IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

SHAWN RUSSUM,	)
	) C.A. No. 11A-04-003 JTV
Appellant,	)
	)
v.	)
	)
CARLA RUSSUM,	)
	)
Appellee.	)

Submitted: June 24, 2011
Decided: September 28, 2011

Laura D. Willis, Esq., Dover, Delaware. Attorney for Appellant.

Carla Russum, *Pro Se.*

Upon Consideration of Appeal From
Decision of the Court of Common Pleas
REVERSED & REMAND

VAUGHN, President Judge

Russum v. Russum
C.A. No. K11A-04-003 JTV
September 28, 2011

ORDER

Upon consideration of the parties' briefs and the record of the case, it appears that:

1. This appeal involves a civil debt action which was dismissed by the Court of Common Pleas.[1] The court below found that the action was barred by the applicable statute of limitation. The facts, as set forth by the court below, are summarized as follows:

> Plaintiff Shawn Russum is the son of Defendant Carla Russum. On or about, April 22, 1986, the defendant obtained a certificate of deposit in the plaintiff's name. The defendant was listed as the custodian for the plaintiff on the certificate of deposit. The plaintiff turned twenty-one years of age on January 30, 1998, and already knew about the certificate of deposit. Sometime before 2006, the plaintiff commenced paying income taxes on the interest accrued on the certificate of deposit for each tax year. On or about August 22, 2006, the certificate of deposit matured. At this point, the defendant liquidated the certificate of deposit and kept the proceeds from it in the amount of $16,039.39. In January of 2008, while he was gathering information to prepare his 2007 income taxes, the plaintiff discovered that the defendant had liquidated the certificate of deposit and kept the proceeds. The plaintiff filed the current debt action for the recovery of all funds the defendant received from the certificate of deposit plus pre and post judgment interest on November 30, 2010.[2]

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[1] *Rossum v. Rossum*, Ca. No. CPU5-10-002706 (Del. Com. Pl. March 25, 2011).

[2] *Id.* at *1-2.

There is also evidence in the record that in early 2007 the plaintiff gathered information to file his 2006 income tax returns. There is evidence that when the plaintiff approached his mother about obtaining the necessary information concerning the certificate of deposit at that time, the defendant informed him that she had already paid the necessary taxes on the CD. This evidence may support an inference that the defendant concealed from the plaintiff that she had converted the proceeds of the certificate to her own personal account several months before. This evidence may also support an inference that the plaintiff accepted this explanation, and that it was only in January 2008 that he discovered what his mother allegedly had done.

2. The court below found that the plaintiff was the actual owner of the CD. In doing so, the court stated that a CD is presumed to belong to the person whose name appears on the certificate, and it was determined that the plaintiff's name was on the certificate. The court below further found that the plaintiff's claim was barred by the applicable three year statute of limitations. Pursuant to 10 *Del. C.* § 8106: "no action to recover a debt ... shall be brought after the expiration of 3 years...." The court below concluded that the cause of action accrued in August 2006, when the defendant cashed in the CD, and that the three year statute of limitation expired in August 2009, before the filing of the suit. In addition, the court concluded that " . . . no exception to the three year limitation applies in this case." In reaching that conclusion, the court analyzed the time of discovery rule, but did not address any other possible exceptions to the statute.

3. The appellant contends that the Court of Common Pleas erred in holding that the claim was barred by the three year statute of limitations; that the court

improperly held that the appellee's wrongful transfer of funds did not constitute an inherently unknowable injury; that the doctrine of fraudulent concealment also operated to toll the statute of limitations; and that the doctrine of equitable tolling also tolled the statute.

4. The appellee contends that the claim is barred by the statute of limitations; that the appellant knew about the CD before his eighteenth birthday, and even before he began paying taxes on the CD in 1995; that the appellant is attempting to make new arguments on appeal that were not argued before the Court of Common Pleas; and that the tolling doctrines now asserted by the appellant – fraudulent concealment and equitable tolling – should not be heard by this Court on appeal.

5. The standard of review by this Court for an appeal from the Court of Common Pleas is the same standard applied by the Supreme Court to appeals from this Court.[3] As such, the standard of review is "whether there is legal error and whether the factual findings made by the trial judge are sufficiently supported by the record and are the product of an orderly and logical deductive process."[4] A motion to dismiss presents the trial court "with a question of law and is subject to *de novo* review by this Court on appeal."[5]

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[3] *Furniture and More, Inc. v. Hollinger*, 2007 WL 2318126, at *1 (Del. Super. July 31, 2007).

[4] *Wright v. Platinum Financial Serv.*, 2007 WL 1850904, at *2 (Del. June 28, 2007).

[5] *Montgomery v. Aventis Pharmaceuticals*, 2007 WL 4577625, at * 2 (Del. Super. Dec. 14, 2007)(citing *Del. State Housing Authority v. J. of Peace Ct.*, 2007 WL 625901, at *2 (Del. Super. Jan. 25, 2007)).

6. I am not persuaded by the appellee's contention that the appellant waived the contentions he now makes concerning the fraudulent concealment and equitable tolling doctrines. The statute of limitations was discussed at a pre-trial conference where the parties were both *pro se*. The trial court itself stated that it wanted "to go back and take a look at the case law on the statute of limitations questions," taking into account such things as "when it was cashed in, when you [the plaintiff] turned eighteen, and when . . . you [the plaintiff] indicate that you found out about the transfer of the money." I think that the trial court should have considered any tolling doctrine which fairly suggested itself under the facts of the case.

7. In Delaware, an action to recover a debt is subject to a three year statute of limitations.[6] The doctrine of tolling, where applicable, only applies until the plaintiff discovers the facts constituting a basis for the cause of action, or knows facts sufficient "to put a person of ordinary intelligence ... on inquiry, which, if pursued, would lead to the discovery of such facts."[7] "The party asserting that tolling applies bears the burden of pleading specific facts to demonstrate that the statute of limitations is, in fact, tolled."[8] For the purposes of the three year statute of limitations, it accrues "at the time of the wrongful act, even if the plaintiff is ignorant

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[6] 10 *Del. C.* § 8106.

[7] *Wal-Mart Store, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004).

[8] *Reid v. Thompson Homes at Centreville, Inc.*, 2007 WL 4248478, at *8 (Del. Super. Nov. 21, 2007).

of the cause of action."[9]

8. Under the circumstances of this case, I agree with the plaintiff that there are three potentially applicable doctrines under which the statute might be tolled. The first exception is the inherently unknowable doctrine, which was discussed by the trial court, "where the injury is inherently unknowable and the claimant is blamelessly ignorant of the wrongful act and the injury complained of."[10] The second potential exception is the fraudulent concealment doctrine. "If there was an affirmative act of concealment or some misrepresentation that was intended to put a plaintiff off the trail of inquiry until such time as the plaintiff is put on inquiry notice," then the statute of limitations will be tolled.[11] Mere ignorance of the facts, however, where there is no concealment, will not toll the statute of limitations.[12] If any fraudulent matter is to toll the statute of limitations it must be material to the underlying cause of action.[13] The third potential exception is the equitable tolling doctrine that is appropriate "where a plaintiff reasonably relies on the competence and good faith of

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[9] *Wal-Mart Store, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004).

[10] *Wal-Mart Store, Inc.,* 860 A.2d at 319 (Del. 2004); *Smith v. McGee*, 2006 WL 3000363, *3 (Del. Ch. 2006).

[11] *Envo, Inc. v. Kim Walters, et al.*, 2009 WL 5173807, at *10 (Del. Ch. Dec. 30, 2009)(quoting *Winner Acceptance Corp. v. Return on Capital Corp.*, 2008 WL 5352063, at *15 (Del. Ch. Dec. 23, 2008)); *see also Johnson v. Geico Cas. Co.*, 673 F. Supp. 2d. 255, 269 (D. Del. 2009).

[12] *Halpern v. Barran*, 313 A.2d 139, 143 (Del. Ch. 1973).

[13] *Harman v. Masoneilan Intern., Inc.*, 442 A.2d 487, 499 (Del. Super. 1982).

a fiduciary."[14]

9. With regard to the court's ruling on the time of discovery issue, I find no error in the court's conclusion that the injury was not inherently unknowable, and conclude that the court should be affirmed as to that point for the reasons given by it. I believe, however, that the fraudulent concealment doctrine, at least, also fairly suggested itself from the evidence in the case, and that the trial court should have considered that potentially applicable exception; and that failure to do so was error. I conclude that the case should be returned to the court below so that the fraudulent concealment and equitable tolling doctrines can be considered by it.

10. For the aforementioned reasons, the decision below is **reversed** and the case is **remanded** for determination on this issue.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.
President Judge

oc: Prothonotary
cc: Order Distribution
File

[14] *Smith*, 2006 WL 3000363, at *3 (quoting *Elite leaning Co. v. Walter Capel and Artesian Water Co.*, 2006 WL 1565161 (Del. Ch. June 2, 2006)); *see also In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *5 (Del. Ch. July 17, 1998).